

Editor's Note: Reconsideration denied by order dated September 11, 1995.

JACKIE IVANKOVICH ET AL.

IBLA 95-503

Decided July 12, 1995

Appeals from, and request for stay of, decisions of the Montana State Office, Bureau of Land Management, declaring placer mining claims void. MTMMC 113475, et al.

Stay denied; appeal dismissed in part; decision affirmed as modified.

1. Mining Claims: Lands Subject To—Mining Claims: Location—Mining Claims: Placer Claims—Mining Claims: Withdrawn Land

In evaluating descriptions of placer mining claim locations, BLM correctly found that any portions of the claims that extended into lands withdrawn from mineral entry were null and void ab initio.

APPEARANCES: William M. Kebe, Jr., Esq., Butte, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Jackie and Nancy Ivankovich have appealed from two May 2, 1995, decisions of the Montana State Office, Bureau of Land Management (BLM), that declared the Lost Dog #57 (MTMMC 113475) and Lost Dog #87 (MTMMC 132723) placer mining claims abandoned and void pursuant to the Omnibus Reconciliation Act of August 10, 1993, 106 Stat. 1374, and 43 CFR 3833.1-5(b) for failure to timely pay \$100 claim maintenance fees or file certificates of exemption from payment of such fees for the 1995 assessment year. Together with their notice of appeal and statement of reasons filed in support of appeal, appellants have applied, under Departmental regulation 43 CFR 4.21(a), for a stay of the two BLM decisions issued on May 2, 1995.

Appellants have also appealed and seek a stay of a BLM decision issued on May 19, 1995, finding that relocations of the two Lost Dog claims made on May 4, 1995, were, as to #57, invalid and, as to #87, invalid in part. The relocated Lost Dog #57 claim was assigned serial number MTMMC 199948; the relocated Lost Dog #87 became MTMMC 199949. Both claims were recorded with BLM on May 8, 1995. The May 19, 1995, decision found the Lost Dog #57 (MTMMC 199948) claim was null and void

ab initio because it was wholly located on lands withdrawn from mineral entry by Public Land Order (PLO) No. 6912. See 56 FR 60928 (Nov. 29, 1991) (protection of archaeological site); see also 55 FR 19672 (May 10, 1990). The Lost Dog #57 (MTMMC 199949) was also found to be null and void ab initio, but only as to part of the claim that was on land included in PLO 6912.

To be entitled to a stay of a BLM decision, appellants must demonstrate, among other things, that there is a likelihood they will prevail on appeal. 43 CFR 4.21(b)(1)(ii). The record before us, however, establishes that they cannot do so in the case of the original claims at issue, because their notice of appeal from the May 2, 1995, decisions was not timely filed. The record shows that the May 2, 1995, decisions were received by appellants at their address of record on May 4, 1995. Therefore, they had until June 5, 1995 (the first day BLM's offices were open following the expiration of the appeal period) to file their notice of appeal with BLM. 43 CFR 4.411(a); see 43 CFR 1821.2! 2(e). Their notice of appeal was not filed with BLM until June 16, 1995, and was therefore untimely. The untimeliness of the appeal cannot be waived under 43 CFR 4.401(a), which establishes a grace period for filing in some circumstances, because the notice of appeal was not transmitted to BLM until June 14, 1995 (at the earliest), after the end of the period in which it was required to be filed. The appeal from the May 4, 1995, decisions must therefore be dismissed since the Board is without jurisdiction to decide the merits of an untimely appeal. See 43 CFR 4.411(c); Lew Landers, 109 IBLA 391, 392 (1989).

[1] Appellants also argue that the decision issued on May 19, 1995, erred in finding that their attempted relocations of the Lost Dog claims were invalid; they contend their claims were not relocated within areas withdrawn from mineral entry, and that BLM found in error that part of the relocated Lost Dog #87 was valid while voiding the remainder of that claim and all of Lost Dog #57. Their request for stay of this decision must also be rejected because there is no likelihood appellants can prevail on appeal.

Lost Dog #87 was relocated by Jackie Ivankovich in the SW¹/₄ of sec. 20 T. 3 N., R. 11 W., Montana Principal Meridian, Deer Lodge County, Montana, directly north of the Lost Dog #57. The 1995 certificate of location described this claim as being "660 feet wide by 1320 feet in length" and lying within the "N¹/₂, NW¹/₄, NW¹/₄ sec. 29" and the "S¹/₂, SW¹/₄, SW¹/₄ of sec. 20." Looking to PLO 6912, which withdrew all of sec. 20 "lying east of Highway 274," as well as "that portion of lot 6 lying east of Highway 274," the BLM decision found the claim was situated within the withdrawal. In doing so, reference was made to a projection by BLM of the claim drawn onto the master title plat, showing that a portion of Lost Dog #57 "invades the lands lying east of Highway 274 in sec. 20 [and] that portion of lot 6 lying east of Highway 274."

Lost Dog #57 was relocated by Nancy Ivankovich in the NW¼ of sec. 29, T. 3 N., R. 11 W., Montana Principal Meridian. The claim is described in the 1995 certificate of location as being "660 feet wide by 1320 feet in length" within the "S½, NW¼, NW¼" of sec. 29. After finding that PLO 6912 withdrew lots 5 and 6 from mineral entry, BLM determined that Lost Dog #57 was situated in lots 6 and 5, within the withdrawn area. A sketch appearing in the case file on a BLM title plat map, apparently prepared by BLM in similar fashion as was done for the companion claim, shows the claim to be entirely situated within the area withdrawn by PLO 6912.

The record indicates, therefore, that these claims have not been surveyed and were not described using rectangular survey methods employed by BLM surveyors; the regulations do not require that they be, although their descriptions should be good enough to enable BLM to "locate the claims or sites on the ground." See 43 CFR 3833.1-2(b)(7); Outline Oil Corp., 95 IBLA 255, 259 (1987). While appellants contend that BLM has mistakenly found their claims are within the withdrawn area, they have not shown that these findings by BLM are in error; what they have done is to establish their intention to avoid the withdrawn area with both relocations. They have also brought attention to the possibility that the claims may not be within the withdrawn area, at least in their entirety. Nonetheless, this showing is not sufficient to establish a likelihood of success on the merits of their appeal; quite the contrary, appellants have failed to show such a likelihood, having established instead their agreement with the ultimate conclusion by BLM that, to the extent the claims encroach upon the withdrawal, they are void. On the record before us, therefore, the request for a stay of the May 19, 1995 decision must be denied. See 43 CFR 4.21(b). Moreover, because appellants have failed to show any likelihood of success on the merits of their appeal from the May 19, 1995, decision, it must be affirmed. See Texaco Trading & Transportation Inc., 128 IBLA 239, 241 (1994).

Since a precise measurement of the claims on the ground has not been made, however, it is not possible to find definitively the precise area of Lost Dog #87 that invades the withdrawn area, or whether some part of Lost Dog #57 may be outside the withdrawal. That being the case, the May 19, 1995, BLM decision must be limited to a finding that any part of the two claims extending into the withdrawal is void. See Marvin Allen, 133 IBLA (1995) and cases cited therein. As so modified, the May 19, 1995, BLM decision is affirmed. The effect of this conclusion is to put appellants on notice that they can obtain no mineral rights inside the area withdrawn by PLO 6912 by their claims.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the application for stay is denied; the appeals from the two May 2, 1995, BLM decisions are

dismissed, and the May 19, 1995, BLM decision is affirmed as modified by this order.

Franklin D. Arness
Administrative Judge

I concur.

David L. Hughes
Administrative Judge